United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7230

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANNETTE HEYMAN

vs.

COMMERCE AND INDUSTRY INSURANCE COMPANY

U. S. District Court, District of Connecticut,
Civil No. B74-330

U. S. Court of Appeals, Second Circuit,
Civil No. 75-7230

On Appeal from the United States District Court
for the District of Connecticut

REPLY BRIEF OF DEFENDANT-APPELLANT

July 15, 1975

John Keogh, Jr.
Attorney for
Defendant-Appellant

Keogh, Candee & Burkhart
34 Wall Street
P. O. Box 126 — Belden Sta.
Norwalk, Connecticut 06852

3

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANNETTE HEYMAN

vs.

COMMERCE AND INDUSTRY INSURANCE COMPANY

U. S. District Court, District of Connecticut,
Civil No. B74-330

U. S. Court of Appeals, Second Circuit,
Civil No. 75-7230

On Appeal from the United States District Court
for the District of Connecticut

REPLY BRIEF OF DEFENDANT-APPELLANT

July 15, 1975

The plaintiff's brief in several instances contains statements which would appear to be proven or uncontroverted facts, whereas in reality, they are merely statements of the plaintiff's version of the facts. It is the defendant's position that in order to have granted the plaintiff's Motion for Summary Judgment in this case, the Court must have accepted many of the plaintiff's claims as proven or admitted facts, and that the Court gave undue weight to the statements contained in the plaintiff's affidavits and briefs.

For instance, on page 2 of the plaintiff's brief, it is stated that the appellant refused to offer the appellee any compensation whatsoever for the loss. This is not a correct statement. The truth of the matter is that the defendant disputed the figure of $247,265.00 which was contained in the plaintiff's proof of loss. Subsequently, the parties entered into negotiations which resulted in the agreement dated August 2, 1973.

Also, at the bottom of page 2 and top of page 3 of the appellee's brief, it is stated that:

> "In direct contravention of the terms of the insurance policy, appellant advised her that the appraisal could not go forward unless the question of actual cash value was determined as well as the question of replacement cost, and appellant ordered its appraiser to stop all work in connection with the appraisal... Appellant continued to refuse to pay any amount to appellee despite the fact that she was obligated under the terms of her lease with her tenant, Sears, Roebuck and Company, to construct new premises, and was obligated to advance substantial sums to honor this obligation."

These are not statements of proven facts, but are merely claims made by the appellee, obviously for the purpose of portraying the appellant in an unfavorable way. As we

have pointed out, the truth of the matter is that the appellant strenuously objected to the amount of $247,265.00 originally claimed by the appellee, but did enter into negotiations which culminated in the agreement of August 2, 1973.

On page 5 of the appellee's brief, it is stated that the appellee's Motion for Summary judgment was based not only upon the pleadings and affidavits, but also upon the exhibits, including the settlement agreement itself, and the oral arguments and interrogation of counsel by the Court. We take issue with the proposition that oral arguments and interrogation of counsel by the Court can form a part of the basis for the entry of summary judgment. Irrespective of this, however, we point out that the oral arguments and interrogation of counsel by the District Court are not part of the record in this case. Certainly, this Court on appeal, cannot assume that there was something contained in the oral arguments and interrogation of counsel by the Court, which justified the Court in entering summary judgment.

At the bottom of page 6 and top of page 7 of the appellee's brief, it is stated:

> "But if it was clear that the new building was under construction when the settlement document was signed, then it is not unreasonable for the District Court to have inferred that its size was known to the appellee, if not to the appellant, at the time of signing of that document."

We call this Court's attention to the fact that the agreement of August 2, 1973 merely states: "... and construction of the building has already commenced." We maintain that it does not follow from this statement in the agreement that the Court could have inferred that the size of the building was already known to the appellant. Moreover, at the middle of page 7 of the appellee's brief,

reference is made to the appellant's opportunity or obligation to have inspected the new building foundation before signing the settlement agreement. Where the agreement merely stated that the construction of the new building had already commenced, it does not follow that a representative of the appellant could have ascertained the size of the new building before signing the settlement agreement. We take issue with the claim that the appellant was under any obligation to have inspected the new building before signing the settlement agreement or before the building was actually completed. It is our claim that it was incumbent upon the appellee to construct a new building of a size comparable to the one which was destroyed, and that the appellant had no duty to inspect prior to completion.

At the bottom of page 5 and top of page 6 of our original brief, we commented on the fact that the agreement of August 2, 1973 should be construed most strongly against the plaintiff as draftsman of the agreement, and we cited authority to this effect. At the bottom of page 7 of the appellee's brief, an attempt is made to waive this principle aside by stating that it is pure happenstance that appellee's counsel drafted the final document. We submit that the appellee cannot in this manner avoid the well-established principle that an agreement is construed most strongly against the draftsman.

The significant language in the agreement of August 2, 1973 is contained in the third "whereas" clause in which it is stated in part as follows: "... insured intends to construct a new building at the Sears, Roebuck complex in order to replace the building which was destroyed..." We maintain that the appellant had the right to rely on this representation that the appellee intended to replace the building which had been destroyed. We do not claim that a replacement building must be identical to the one which was destroyed. Our original

brief contains ample authority to the effect that a replacement building must be substantially the same or the equivalent of the one destroyed. The appellant had the right to rely on the appellee's representation that the building would be replaced and that it would be replaced by a new building, substantially comparable to the one which was destroyed. It follows therefore, that the defendant agreed to a replacement cost of $187,500.00 for a building of 14,000 square feet. We claim that it has not been established that the entire $187,500.00 was actually spent on the new building. This is the type of factual question which can be adjudicated only by a trial of the case. We submit that the plaintiff is not entitled to collect the entire replacement cost where a much smaller building was constructed.

For the sake of argument, we will assume that the defendant insurance company had written many policies which contained the replacement cost clause. It is fair argument to state that the practice of collecting replacement cost when a building is not actually replaced by an equivalent or substantially comparable building, should not be encouraged.

From a reading of page 6 of the Ruling of the District Court, it is apparent that the Court placed considerable reliance on the plaintiff's claim that the amount of the settlement was insufficient to replace the building which had been destroyed with an equivalent building. It is also apparent from reading page 6 and page 9 of the Ruling, that the District Court was influenced by the statement in the plaintiff's affidavit that the replacement cost of the burned building totaled $247,265.00, and that the agreed sum of $187,500.00 was $59,765.00 less than the figure of $247,265.00. We maintain that the agreement of August 2, 1973 should be construed to the effect that the agreed replacement cost was $187,500.00.

The third whereas clause in the agreement of August

2, 1973, constituted a binding agreement on the part of the plaintiff to replace the building which had been destroyed, and this clause cannot be brushed aside as a mere expression of intent. The defendant recognizes said agreement to be a binding compromise and settlement. A valid compromise requires mutual concessions, **Ross Packing Company v. United States**, 42 F. Supp. 932. A concession to be adequate consideration in such a compromise and settlement can involve relinquishment of a claim and/or the fulfillment of a specified obligation, 15 Am. Jur. 951. Here the plaintiff relinquished its claim under the insurance policy and, by the third whereas clause, assumed a specific obligation to replace the destroyed building. No specific words are necessary to create a promise binding in law. **Webster v. Upton**, 91 U.S. 65. The fact that the word "intend" was used does not make the plaintiff's performance nonbinding. If a fair interpretation of the words make it appear that a promise was intended it will be so interpreted. **E. I. du Pont de Nemours & Co. v. Clairborn-Reno Company**, 64 F. 2d 224. No where in the plaintiff's brief is there a denial of her obligation to "replace". What is denied by the plaintiff is her duty to construct a "specific" kind of building.

The defendant further contends that by the terms of the settlement agreement there is a recognition of mutual concessions. On the plaintiff's side we have an agreement to (1) replace the destroyed building, and (2) release all claims under the policy of insurance. On the defendant's side we have an agreement to pay One hundred eighty-seven thousand five hundred ($187,500.00) dollars in full settlement of the plaintiff's claim. A contract is not invalid merely because every obligation of the one party is not met by an equivalent obligation of the other party. **J. Berry & Sons Company v. Monark Gasoline & Oil Co.**, 32 F. 2d 74. **Levin v. Perkins**, 12 Wisc. 2d 398. Equality of benefit is also unnecessary. **Haynes Auto Company v. Turner**, 18 Ga. App. 22. A contract should

be construed to make the promises mutually binding upon the parties unless such construction is wholly negatived by the language used. **T. W. Jenkins & Company v. Anaheim Sugar Company**, 247 F. 958.

The defendant submits that it justifiably relied upon the concessions made by the plaintiff and the plaintiff should be estopped to deny the binding nature of the aforesaid concessions.

It is the defendant's contention that the Parole Evidence Rule does not bar introduction of the affidavits referred to on page four of the defendant's brief. From the terms of the contract the use of the word "replace" may lend itself to more than one meaning. In such a situation, the surrounding circumstances at the time the agreement was made should be considered for the purpose of ascertaining its meaning and the intention of the parties. **Sturtevant v. Sturtevant**, 146 Conn. 64. 17 Am. Jur. 2d 680. In construing a contract a court should place itself in the situation occupied by the parties when the agreement was made. **Massey-Ferguson, Inc. v. Bent Equipment Company**, 283 F.2d 12. The affidavits in question directly concern a material issue of fact concerning the parties understanding as to what was actually meant by the term "replace". General or indefinite terms in a contract may be explained or restricted by the circumstances surrounding its execution. **W. B. Saunders Company v. Ducker**, 16 Md. 474. The sense in which the parties employed the words must be ascertained from an examination of the entire instrument read in the light of circumstances surrounding its execution. **Sand Filtration Corporation v. Cowardin**, 213 U.S. 360. **Federal Surety Co. v. A. Bentley and Sons Company**, 51 F. 2d 24. The defendant contends that the Parole Evidence Rule is inapplicable here. Nowhere is the intent to vary or contradict any of the terms of the agreement.

The defendant further submits that the settlement

agreement was only a partial integration of the total agreement of the parties and that resort to said affidavits and the prior negotiations is permissible to supply things that were omitted (i.e. the kind of building to be constructed) if the part omitted is not inconsistent with the writing but independent of, and in addition to it. **Greene v. Gust**, 26 Ill. App. 2d 2. The court may consider portions of an entire agreement not contained in the writing where it appears that only a part of it was reduced to a writing. **Booth v. Booth and Bayliss Commercial School, Inc.**, 120 Conn. 121. It has been held that a written contract may even be varied by an oral agreement where it was collateral and not inconsistent with express or implied conditions of the written contract. **Mitchill v. Lath**, 247 N.Y. 377. The defendant, however, only seeks the introduction of such collateral matters to aid in the interpretation of the written agreement and not to contradict its terms.

Where the parties by the language employed leave their meaning uncertain when applied to the subject matter, then the expressions of speech used in previous negotiations, even if coming from one of the parties themselves, are admissible. In one case where there was a specific agreement conveying a right to cut "all of the pine, timber and trees" on the land, the court allowed introduction of correspondence between the parties which specifically referred to the type and size of the lumber that was to be cut. The court applied the limitations set forth in the prior negotiations as evidence of the parties' intent. **Williams v. Johns-Carroll Lumber Company**, 238 Ala. 536. By analogy, if there is some ambiguity in the settlement agreement specifically the third whereas clause, as to the term "replace", then the court should allow evidence of the prior negotiations as the best evidence of the parties' intent.

It is the defendant's position that the provisions of the

policy of insurance should be considered by the court and that the Parole Evidence Rule should be no bar to its introduction. It is clear that the plaintiff's rights against the defendant are derived from the insurance policy. It is the defendant's contention that in order to effectively interpret the settlement agreement resort to said policy is necessary. Reference to the insurance policy is made on three separate occasions in the written settlement agreement.

> "Other writings or matters which are referred to in a written contract may be regarded as incorporated by reference as a part of the contract and may properly be considered in the construction of a contract." **Day v. United States**, 245 U.S. 159. 17 Am. Jur. 2d 666.

As draftsman of the agreement, the plaintiff could have inserted a recital of completeness into the agreement. Her failure to do so is further indication that the agreement was a mere partial integration. The settlement agreement merely pertained to the amount agreed upon in satisfaction of plaintiff's unliquidated claim under the insurance policy provisions. The court should consider portions of an entire agreement not contained in the writing where it appears that only part of it was intended to be reduced to writing. **Booth v. Booth and Bayliss Commercial School, Inc.**, 120 Conn. 221. Where the collateral matter is of such a nature that the parties could not reasonably be expected to embody it in the written agreement the courts have considered it to give meaning to the written agreement. **Mitchill v. Lath**, 247 N.Y. 377. It would seem a reasonable interpretation that in light of the parties' reference to the provisions of the policy of insurance, the court should be able to consider said provisions as an aid in interpreting the parties' intentions.

CONCLUSION

For the reasons stated herein and also in the appellant's original brief, the summary judgment rendered in favor of the plaintiff, should be reversed.

Respectfully submitted,

John Keogh, Jr.
Attorney for
Defendant-Appellant

Keogh, Candee & Burkhart
34 Wall Street
P. O. Box 126—Belden Station
Norwalk, Connecticut 06852

LAW OFFICES

KEOGH, CANDEE & BURKHART

JOHN KEOGH 1871 1960
JOHN KEOGH, JR.
ALFRED W. BURKHART

J. ALLEN KERR, JR.
JAMES J. FARRELL III

TELEPHONE {866-2535 866-2536

P. O. BOX 126
34 WALL STREET
NORWALK, CONN. 06852

August 5, 1975

75-7230

A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: Civil Action No. 75-7230
Annette Heyman vs. Commerce and Industry Ins. Co.

Dear Mr. Fusaro:

Enclosed is certificate of service of copies of the defendant's reply brief on counsel for the plaintiff. Please be advised that 25 copies of the brief are being sent directly to your office by the printer.

Very truly yours,

John Keogh Jr.

John Keogh, Jr.

JK,JR:nv
enclosure